IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

CWP No. 1265 of 2005

Date of Decision: 27th August, 2007

Dalip Singh	Petitioner
Versus	
Union of India and others	Respondents

Coram

The Hon'ble Mr. Justice Sanjay Karol,J.

Whether approved for reporting[1]? No.

For the petitioner: Mr.B.N.Mehta, Advocate.

For the respondents: Mr.Janesh Mahajan, Central Govt. Counsel.

Sanjay Karol, J. (Oral)

Petitioner herein as prayed for the following reliefs:-

(i) That the petitioner in the facts and circumstances may be held entitled to serve upto the completion of 20 years service as has been done in other similar cases;

(ii) That the respondent may be directed to pay to the petitioner special compensation @ 60% disability or in the alternative 50% as the Rules provide that such compensation be paid @ 50% in all cases having below 50% disability.

(iii) That the respondent may be directed to pay to the petitioner the disability pension @ 60% as assessed by the MH alongwith interest as applicable in such like cases in view of the above said circumstances of the case justice may be done to the petitioner."

Brief facts giving rise to filing of the present writ petition are that petitioner was enrolled with the Border Security Force as Constable on

[1] Whether the reporters of Local Papers are allowed to see the Judgment?

7.8.1989. During the course of his service, he was posted at various places and on 24.6.2002 in Shrinagar while patrolling the border area he stepped on live mine resulting into serious injuries on his right foot. He was evacuated and treated at Military Hospital where his right foot was amputated and for the purpose of ex-gratia grant his disability was assessed at 60% by the Military Hospital.

In accordance with service conditions, the Medical Board duly constituted by the respondent medically examined the petitioner, who assessed the petitioner's disability as 40% and placed him under low medical category $S_1H_1A_{3(L)(P)}P_1E_1$. He was again examined by the Medical Board at SHQ BSF, Sriganganagar (Rajsthan) on 29.6.2005, when again his disability was assessed at 40% and he was recommended unfit for further service and placed under permanent medical category $S_1H_1A_{5(P)}P_1E_1$. The recommendation of the Medical Board was accepted. However, for the reasons which are not evident from the record, petitioner was again got medically examined by the Medical Board on 9.9.2005 when again the review Medical Board reassessed the petitioner's disability at 40% and recommended him unfit for further service. Accordingly on 30.11.2005, he was medically boarded out with all statutory benefits. At that time he was 35 years and 6 months old and had served the BSF for 16 years and 23 days. The petitioner was paid a sum of Rs.2,96,696/-.

Learned counsel for the petitioner has argued that action of the respondent is discriminatory and the petitioner has been wrongly relieved from the service inasmuch as services of Shri A.S.Abadhali and Shri Vinod Kumar Constable, who were similarly situated have been retained whereas petitioner has been relieved. Alternatively, it is his submission that disability compensation determined had to be based on 60% disability as assessed by the Military Hospital instead of 40% and in any event it has to be at 50% as

is clear from respondents' OM dated 3.2.2000. He further submits that in view of provisions of Section 47 read with Section 73(3) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the Act) he ought to have been continued in service notwithstanding the fact that the Central Government had issued a Notification exempting the respondents from the provisions of Section 47.

Per contra, learned counsel for the respondents has submitted that respondent-Organization was exempted from the applicability of provisions of Section 47 of the Act vide Notification dated 10.9.2002, therefore, they were free to take action as per recommendation of the Medical Board. Even though petitioner was found unfit and recommended to be relieved from service in the year 2003, however, keeping in view the provisions of Section 47, he was allowed to be retained in service. Vide Office Memorandum dated 30.1.2003 a decision was taken to relieve the persons having disability of 40% and above within 5 years from the date of injury. Accordingly, action was taken. In so far as the discrimination alleged by petitioner, learned counsel submitted that disability of Shri Vinod Kumar is less than 30% and Shri A.S.Abdhali is an officer falling in Category 'A' and in terms of OM dated 30.1.2003, the officials having less than 50% disability have been considered to be retained in service. Consequently, the action of the respondents is justifiable in law. He clarified that OM dated 3.2.2000 is applicable only in those cases where the employee is not retained in service and is entitled to disability pension unlike the case of the petitioner, who was not only retained in service but also got the lumpsum compensation and not disability pension in accordance with OM dated 30.1.2003.

Petitioner was serving in Border Organisation when he suffered an injury on 24.6.2002. He was immediately evacuated and taken to the nearest Military Hospital where he was treated and unfortunately his right foot had to be amputated. For the purposes of payment of ex gratia grant, petitioner's disability was assessed at 60% and subsequently on 14.1.2003, 29.6.2005 and 9.9.2005, he was examined by the Medical Board duly constituted by the respondent BSF where his disability was assessed at 40%.

In my view, the petitioner's disability cannot be assessed at 60% for the simple reason the Military Hospital had assessed the disability only for the purpose of ex-gratia payment and nothing more. For the purposes of service benefits he was necessarily required to be assessed by the Medical Board duly constituted in accordance with the service conditions and Rules of the respondent-Organization.

In view of the Notification exempting the applicability of Section 47 of the Act, it cannot be directed that petitioner be retained in the service of the respondent. Section 73(3) of the Act would not come to the rescue of the petitioner for the simple reason that Section 73(3) only saves the actions which have been taken between the tabling of the Rules in the Parliament and the amendments which may be carried out by the Legislature. Therefore, the contention needs to be rejected.

The submission of the learned counsel for petitioner that petitioner has been discriminated by the respondents by relieving him from the service is also unfounded for the simple reason that OM dated 30.1.2003 makes it evidently clear that officers (category 'A') having disability of more than 50 % can be retained in service. Constable falling in Categories 'D' and 'E' having disability of 40% and above only are required to be boarded out from the Organisation. This fact is undisputed that Shri A.S.Abdhali is an officer and Vinod Kumar, Constable, is having disability of less than 40%,

therefore, this contention needs to be rejected. In view of the Policy and petitioner's disability being 40% he had to be boarded out and rightly relieved. The policy has not been challenged in the present proceedings.

Clause 6 (a) of OM dated 30.1.2003 lays down the formula for calculating the lumpsum compensation payable to the employees, who are retained in service. It deals with two situations, (i) where the employee is retained in service and (ii) where the employee is invalidated and relieved accordingly. Since the petitioner's case was that of initial retention in service, the petitioner was paid lumpsum compensation i.e. Rs.2,96,696/- on 28.6.2004 based on the said formula. This, however, was calculated on the basis that petitioner is likely to be retained in service. In terms of para 5 of OM dated 30.1.2003 the percentage of disability has to be assessed on the basis of para 5 of OM dated 3.2.2000, wherein it is clearly mentioned that "in accordance with the recommendation of Fifth Central Pay Commission, it has been decided that the extent of disability has to be determined in the following manner for the purpose of computing the disability element forming part of benefits:-

> "(i) The extent of disability or functional incapacity shall be determined in the following manner for purposes of computing the disability element forming part of benefits:-

Percentage of disability assessed by Medical Board	Percentage to be reckoned for computation of disability element
Less than 50	50
Between 50 and 75	75
Between 76 and 100	100."

Thus for the purposes of determining the compensation petitioner's disability has to be assessed at 50%.

I do not find favour with the submission of learned counsel for the respondent that OM dated 3.2.2000 is applicable only in the cases

where the person is entitled for disability pension and not lumpsum compensation. This is quite evident from the bare reading of Clause 5 of OM dated 30.1.2003. In fact the said clause is not applicable to cases pertaining to disability pension at all.

For the foregoing reasons, the present writ petition is partly allowed. Prayers (i) and (iii) of prayer clause cannot be allowed. The respondents are directed to recalculate the compensation payable to petitioner keeping in view his disability at 50%. The needful shall be done as also the difference in the amount of payment of compensation shall be paid to the petitioner within a period of three months from today.

27th August, 2007
(C)

(Sanjay Karol),
Judge.